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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ROBERT HEIZELMAN
12 BOP #20068-298,
13 BRIAN McCLURE

14 Plaintiffs,

15 vs.
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17 CRAIG DURHAM, LESLIE JOHNSON;
18 DARLENE SMITH; IDAHO DISTRICT
19 JUDGES (CURRENT; AND JOHN
20 DOES,

21 Defendants.
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Civil No. 10-1560 BTM (WMc)

ORDER:

**(1) DISMISSING PLAINTIFF BRIAN
McCLURE;**

**(2) GRANTING PLAINTIFF
HEIZELMAN'S MOTION TO
PROCEED IN FORMA PAUPERIS;
AND**

**(3) SUA SPONTE DISMISSING
COMPLAINT AS FRIVOLOUS
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) & 1915A(b)**

24 Plaintiffs, federal inmates currently incarcerated at the Metropolitan Correctional Center
25 located in San Diego, California and proceeding pro se, filed a civil rights Complaint on July 22,
26 2010. Initially, neither Plaintiff filed a Motion to Proceed *In Forma Pauperis* ("IFP"). The
27 Court issued an Order on August 3, 2010 requiring both Plaintiffs to either pay the entire initial
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1 civil filing fee or file Motions to Proceed IFP by August 30, 2010. *See* Aug. 3, 2010 Order at

2 2. That time has passed and only Plaintiff Heizelman has filed a Motion to Proceed IFP.

3 **I. Dismissal of Plaintiff Brian McClure**

4 Plaintiff Heizelman purports to bring this action on behalf of Plaintiff Brian McClure.
5 However, because Plaintiff Heizelman is proceeding pro se, he has no authority to represent the
6 legal interest of any other party. *See Cato v. United States*, 70 F.3d 1103, 1105 n.1 (9th Cir.
7 1995); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); *see also*
8 FED.R.CIV.P. 11(a) (“Every pleading, written motion, and other paper shall be signed by at least
9 one attorney of record in the attorney’s original name, or if the party is not represented by an
10 attorney, shall be signed by the party.”). Moreover, Plaintiff McClure has not signed the
11 Complaint, filed a Motion to Proceed IFP or indicated to the Court in any way that he is a party
12 to this action. Thus, Plaintiff Brian McClure is DISMISSED from this action.

13 **II. Motion to Proceed IFP**

14 All parties instituting any civil action, suit or proceeding in a district court of the United
15 States, except an application for writ of habeas corpus must pay a filing fee of \$350. *See* 28
16 U.S.C. § 1914(a). Prisoners granted leave to proceed IFP however, remain obligated to pay the
17 entire fee in installments, regardless of whether the action is ultimately dismissed for any reason.
18 *See* 28 U.S.C. § 1915(b)(1) & (2).

19 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
20 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
21 statement (or institutional equivalent) for the prisoner for the six-month period immediately
22 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). The institution having custody
23 of the prisoner must collect payments, assessed at 20% of the preceding month’s income, in any
24 month in which the prisoner’s account exceeds \$10, and forward those payments to the Court
25 until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

26 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
27 § 1915(a)(1). In this affidavit, Plaintiff claims that he has been unable to obtain a certified copy
28 of his inmate trust account statement. Based upon this information, the Court **GRANTS**

1 Plaintiff's Motion to Proceed IFP and assesses no initial partial filing fee pursuant to 28 U.S.C.
 2 § 1915(b)(1). The \$350 balance shall be collected and forwarded to the Clerk of the Court
 3 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1) as set forth
 4 at the end of this Order.

5 **III. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

6 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 7 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 8 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 9 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 10 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 11 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
 12 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 13 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
 14 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 15 446 (9th Cir. 2000) (§ 1915A).

16 In reviewing the Complaint, it is difficult to understand the underlying factual allegations
 17 that Plaintiff claims give rise to alleged constitutional violations. In his Complaint, Plaintiff
 18 alleges that he was "tortured" in a prison in Idaho for a number of years and contends that this
 19 torture has been "hidden by the Idaho Federal Courts and the Clerks there." See Compl. at 1.
 20 Plaintiff further claims that he was "throw[n] out of state to hide torture going on there." *Id.* at
 21 2. Plaintiff makes a number of allegations on behalf of former Plaintiff Brian McClure.
 22 However, since Plaintiff McClure has been dismissed from this action, these claims have no
 23 relevancy in the action brought by Plaintiff Heizelman. A complaint is frivolous "where it lacks
 24 an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here,
 25 the Court finds Plaintiff's claims to be frivolous under § 1915A because they lack even "an
 26 arguable basis either in law or in fact," and appear "fanciful," "fantastic," or "delusional."
 27 *Neitzke*, 490 U.S. at 325, 328. Thus, the Court dismisses the entirety of Plaintiff's Complaint
 28 as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A.

1 **IV. Conclusion and Order**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff Brian McClure is **DISMISSED** from this action.

4 2. Plaintiff Heizelman's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) is
5 **GRANTED**.

6 3. The Warden of the Metropolitan Correctional Center, or his designee, is ordered
7 to collect from Plaintiff Heizelman's prison trust account the \$350.00 balance of the filing fee
8 owed in this case by collecting monthly payments from the trust account in an amount equal to
9 twenty percent (20%) of the preceding month's income credited to the account and forward
10 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
11 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
12 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

13 4. The Clerk of the Court is directed to serve a copy of this order on Warden, MCC,
14 San Diego, 809 Union Street, San Diego, California 92101.

15 **IT IS FURTHER ORDERED** that:

16 5. Plaintiff Heizelman's Complaint is **DISMISSED** as frivolous pursuant to 28
17 U.S.C. § 1915A. Moreover, because the Court finds amendment of Plaintiff's claims would be
18 futile at this time, leave to amend is **DENIED**. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
19 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of discretion where further
20 amendment would be futile); *see also Robinson v. California Bd. of Prison Terms*, 997 F. Supp.
21 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot, state a claim containing an
22 arguable basis in law, this action should be dismissed without leave to amend; any amendment
23 would be futile.") (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

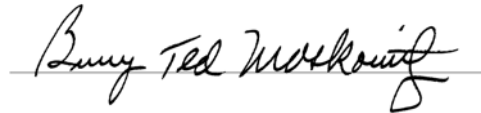
24 6. Further, this Court **CERTIFIES** that any IFP appeal from this Order would not
25 be taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United States*, 369
26 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant
27 is permitted to proceed IFP on appeal only if appeal would not be frivolous).

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1 The Clerk shall enter judgment for the Defendants and close the file.

2 **IT IS SO ORDERED.**

3 DATED: September 20, 2010

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5 Honorable Barry Ted Moskowitz
6 United States District Judge
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